APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED NOVEMBER 20, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 01-15024-E

EDWARD R. POPICK,

Petitioner-Appellant,

versus

MICHAEL MOORE,
Director of Florida Department of Corrections,
ROBERT A. BUTTERWORTH,
Attorney General of the State of Florida,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

Appendix A

Appellant raised three claims, two of which he defaulted in state court. His only remaining claim was that his offense of conviction was not a crime under existing Florida law at the time of his indictment and conviction. For the reasons outlined at length in the district court's thorough order, we find that the district court properly denied appellant's § 2254 petition on both substantive and procedural grounds and that appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DATED AND FILED AUGUST 31, 2001

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:99-CV-134-T-23EAJ

EDWARD R. POPICK,

Petitioner,

v.

MICHAEL W. MOORE,

Respondent.

ORDER

Petitioner Edward R. Popick (Popick) has filed a Notice of Appeal (Doc. 17), which is deemed to include a Motion for Certificate of Appealability. *Edwards v. United States*, 114 F.3d 1083 (11th Cir. 1997).

On April 24, 1996, the President signed into law amendments to 28 U.S.C. §§ 2244, 2253, 2254, 2255, Appellate Rule 22, and 21 U.S.C. § 848(q). As a result, this Court should grant an application for certificate of appealability only if the petitioner makes a substantial showing of the denial of a constitutional right. To make this

substantial showing, the petitioner "must demonstrate that the issues are debatable among jurists of reason" or "that a court could resolve the issues [differently]." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) (citation omitted). In addition, the petitioner could show "the questions are adequate to deserve encouragement to proceed further." *Id.*

Specifically, where a district court has rejected a prisoner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 120 S.Ct. 1595, 1604 (2000); *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000). When the district court has rejected a claim on procedural grounds, the petitioner must show that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack*, 120 S.Ct. at 1604; *Franklin v. Hightower,* 215 F.3d 1196 (11th Cir. 2000) (per curiam).

In this action, the court rejected the petition for writ of habeas corpus on the merits and on procedural grounds. Popick has failed to make the necessary showings for issuance of a certificate of appealability. The requirement of a certificate of appealability was meant to prevent this type of petition from proceeding any further.

Accordingly, the Court orders:

Popick's construed Motion for Certificate of Appealability (Doc. 17) is **DENIED.**

Appendix B

ORDERED in Tampa, Florida, on August 31st, 2001.

s/ Steven D. Merryday
Steven D. Merryday
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DATED AND FILED JULY 30, 2001

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:99-CV-134-T-23EAJ

EDWARD R. POPICK,

Petitioner,

v.

MICHAEL W. MOORE,

Respondent.

ORDER

Edward R. Popick (Popick) petitions for the writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. 1) Respondent has filed an answer to the petition, and Popick has filed a reply. (Docs. 5, 6)

In an information filed on April 28, 1993, in the Circuit Court for Pinellas County, Florida, Popick was charged with four counts of trafficking in hydromorphone, commonly known by the trade name Dilaudid, in violation of § 893.135, Florida Statutes. On March 8, 1994, an amended information was filed which added sixty-three counts to the four count information.

Appendix C

On March 16, 1994, Popick pled guilty to all sixty-seven counts and was sentenced as contemplated during the plea negotiations.[1]

Popick raises three closely related and interdependent claims. First, Popick alleges that trafficking in hydromorphone was not a crime in Florida in 1994 when he entered his guilty plea. Second, Popick claims that his attorney was ineffective for (a) failing to challenge the information as failing to state a crime, (b) failing to advise him that trafficking in hydromorphone was not a crime in Florida, and (c) failing to use the non-existence of the trafficking offense to his advantage in plea negotiations. Third, Popick claims that his plea was involuntary because he believed trafficking in hydromorphone was a crime in Florida.

Popick has adequately exhausted state court remedies for his first ground for relief. On appeal from the denial of a motion for post-conviction relief under Florida Criminal Procedure Rule 3.850, Popick raised for the first time his claim that the trial court lacked subject matter jurisdiction because trafficking in hydromorphone was not a crime in Florida in 1994 when he entered his plea. Respondent contends that Ground One is procedurally barred because the claim was not timely raised in state court and because Popick couched his argument in state court strictly in terms of state law and advanced no federal due process argument, as now. However, Respondent's procedural bar arguments are rejected because the defense of lack of subject matter jurisdiction presents a claim of fundamental error and can

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1. Although Popick stated at the change of plea hearing that he did not intend to appeal, appellate paperwork was filed. However, Popick subsequently voluntarily dismissed the appeal.

be raised at any time. *E.g. Waters v. State*, 354 So.2d 1277 (Fla. 2d DCA 1978). In any event, the claim raised in state court was sufficiently similar to Ground One of the present petition to satisfy the exhaustion requirement.

Popick has not raised his remaining claims in state court. Therefore, those claims are not exhausted and are procedurally barred.[2] Popick has shown neither cause for the default nor actual prejudice as a result of the alleged violation, or that failure to consider the claims results in a fundamental miscarriage of justice, as required to overcome the default. *Coleman v. Thompson*, 501 U.S. 722 (1991).

Ground One — Merits

Popick stands convicted of trafficking in illegal drugs in violation of § 893.135, Florida Statutes. The 1991 version of that statute, which was in effect at the time of Popick's arrest, provided in pertinent part as follows:[3]

> Any person who knowingly sells . . . delivers . . . or who is knowingly in . . . possession of, 4 grams or more of any morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b) or (2)(a), or 4 grams or more of any mixture containing any such substance . . . commits a felony of the

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2. Respondent has asserted that the claims are not exhausted and are procedurally barred.

3. Popick was arrested in March, 1993, for incidents occurring prior to March, 1993. Application of the 1993 version of the statute is limited to offenses committed on or after April 22, 1993. *See* § 893.135, Fla. Stat. (1993), Note 1(a).

> first degree, which felony shall be known as "trafficking in illegal drugs."

Section 893.135(1)(c), Fla. Stat. (1991). Hydromorphone is listed in § 893.03(2)(a)1.k.

In 1995, after Popick's conviction became final, the Florida legislature, recognizing that persons had avoided conviction under § 893.135(1)(c) for trafficking in semi-synthetic derivatives of opium that were not listed in the statute, including oxycodone, hydrocodone, and hydromorphone, amended § 893.135(1)(c) to read in pertinent part as follows:[4]

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4. The legislative notes for the bill which amended § 893.135(1)(c), CS/HB 1385, state in pertinent part:

> [T]he bill amends s. 893.135(1)(c) 1. to create the offenses of trafficking in oxycodone, hydrocodone, hydromorphone, or any salt, isomer, or salt of an isomer of these substances. The bill also amends this subsection to create the offenses of trafficking in any derivative of oxycodone, hydrocodone, hydromorphone, opium, morphine, or heroin.
>
> . . . . .
>
> In several recent court cases in Florida, persons avoided conviction under this section for trafficking in semi-synthetic derivatives of opium which are not listed in this statute, including oxycodone, hydrocodone, or hydromorphone.
>
> . . . . .
>
> Trafficking in oxycodone, hydrocodone, hydromorphone, or any derivative, salt, isomer or salt of an isomer, or any derivative or opium, morphine, or heroin will be prohibited and made a first degree felony.

(Doc. 6, Exhibit A)(spelling errors corrected).

Appendix C

> Any person who knowingly sells . . . delivers . . . or who is knowingly in . . . possession of, 4 grams or more of any morphine, opium, **oxycodone, hydrocodone, hydromorphone** or any salt, **derivative,** isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(l)(b) or (2)(a), or 4 grams or more of any mixture containing any such substance . . . commits a felony of the first degree, which felony shall be known as "trafficking in illegal drugs."

Section 893.135(1)(c), Fla. Stat. (1995) (emphasis added).

Only a few Florida cases provide guidance relative to Popick's claim.[5] In *State v. Diloreto*, 600 So.2d 25 (Fla 4th DCA 1992), Florida's Fourth District Court of Appeal affirmed an order granting a defendant's motion to dismiss a charge of trafficking in oxycodone as not stating a crime punishable under § 893.135(1)(c)(3)(1989). *Diloreto* determines that oxycodone is a derivative of thebaine, which is sometimes derived from a constituent of the opium plant but which is sometimes derived from a poppy other than the opium poppy. The state conceded that the controlled substance in *Diloreto* "is not heroin, morphine, opium, or

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5. Respondent cites only *Peoples v. State*, 576 So.2d 783 (Fla. 5th DCA 1991), in opposition to Petitioner's claim in Ground One. Peoples challenged on direct appeal his conviction for trafficking in hydromorphone under § 893.135(1)(c) 1 and 893.135(5), but did so on grounds other than the ground at issue here. *Peoples* demonstrates only that defendants other than Popick were convicted of trafficking in hydromorphone under § 893.135(1)(c) prior to the 1995 amendments to that statute.

any salt, isomer, or salt of an isomer, of morphine or opium; nor is it manufactured from any such substance." *Id.* at 25. The court held:

> The trial court correctly recognized that trafficking under section 893.135(1)(c) 3 (1989) does not encompass all controlled substances listed in sections 893.03(1)(b) or (2)(a); Florida Statutes, but only those specified by its terms. The statute must be accorded its plain meaning. The state would expand the interpretation of the statute to include all substances listed in section 893.03 (1) (b) or (2) (a), notwithstanding the explicit wording of the statute. However, criminal statutes must be strictly construed.

Id. (footnote and case citations omitted).

Diloreto involves a simple distinction: some drugs may appear in two or more forms, one or more of which contain an opium derivative and one or more of which contain no opium (or morphine). The 1991 version of the statute only covers the forms containing opium or morphine. The 1995 version corrects this oversight and includes the specified drugs, even if derived from a synthetic precursor, rather than opium. In other words, *Diloreto* turns on whether § 893.135(1)(c) (1989) proscribed trafficking in a drug derived from a non-opium plant. The *Diloreto* court's statement that § 893.135(1)(c) "does not encompass all controlled substances listed in sections 893.03(1)(b) or (2)(a), Florida Statutes, but only those specified by its terms" therefore applies only to drugs derived from non-opium plants and cannot be interpreted more broadly to apply also

to drugs which are derived from opium plants. Pursuant to *Diloreto*, trafficking in the drugs listed in § 893.03(1)(b) or (2)(a) is not prohibited under § 893.135(1)(c) unless the drugs listed in those sections are "morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin." Section 893.135(1)(c) 3, Fla. Stat. (1989).

Two years later in *State v. Collins*, 639 So.2d 633 (Fla. 2d DCA 1994), the State appealed an order dismissing an information charging the defendant with trafficking in oxycodone in violation of § 893.135(1)(c), Florida Statutes (1993). The court reversed and remanded for an evidentiary hearing to determine the botanical origin of the oxycodone, reasoning as follows:

> Although oxycodone is nominally within the classification of controlled substances referred to in section 893.03, Florida Statutes (1993), as a Schedule II derivative of opium, it is not proscribed by section 893.135(1)(c)(1) if it is obtained from a non-opium producing poppy. *State v. Diloreto*, 600 So.2d 25 (Fla. 4th DCA 1992). Of course, if the oxycodone in question originated in opium, the trial court was in error in dismissing the information in the light of section 893.135(1)(c) 1 which, in relevant part, provides that:
>
> > Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of any morphine, opium, or any salt, isomer,

> or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b) or (2)(a) or 4 grams or more of any mixture containing any such substance or mixture, commits a felony of the first degree which felony shall be known as "trafficking in illegal drugs."
>
> Here, unlike in *Diloreto*, a decision referred to by the state and [the defendant], there is neither a stipulation nor evidence disclosing that the organic source of the oxycodone excludes it from the Schedule II substances.

State v. Collins, 639 So.2d 633-634 (Fla. 2d DCA 1994).

Finally, in *Todd v. State*, 648 So.2d 249 (Fla. 3d DCA 1994), the defendant challenged his conviction by writ of coram nobis on the ground that Dilaudid is neither "morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin" as specifically set forth in § 893.135(1)(c), Fla. Stat. (1987). Although the State conceded the defendant's argument, Florida's Third District Court of Appeal denied relief on the basis that, because the defendant and his attorney could easily have discovered the composition of Dilaudid at the time of the plea and asserted his claim then, one of the fundamental prerequisites for coram nobis relief, "due diligence," was therefore not satisfied.[6] In so finding, the

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6. The court found it inappropriate to forego the due diligence requirement under an actual innocence theory because the defendant was clearly guilty of the felony of simple possession of a substance designated in § 893.03 (2) (a) 1.k for which he could have been convicted and sentenced.

court explicitly avoided determining whether *Diloreto* was correctly decided. The court noted, however, that the prosecution had "rather persuasively" argued that the statutory interpretation utilized in *Diloreto* improperly reads out of the statute the phrase "as described in s. 893.03(1)(b) or (2)(a)." 648 So.2d. 249, 250 n.2

In the present case, Popick does not claim that the organic source of hydromorphone excludes it from the ambit of § 893.03(2)(a), and the State has not conceded that point. Nor does that argument have apparent merit. The Physician's Desk Reference (PDR), (1999 Edition), describes Dilaudid as "a hydrogenated ketone of morphine," a derivative of opium.

The reference in § 893.135(1)(c) to the substances listed in § 893.03(2)(a) sufficiently identifies hydromorphone as subject to the trafficking statute to satisfy the requirement of due process. Popick's argument that the reference to § 893.03(1)(b) and (2)(a) in 893.135(1)(c) modifies only the word "heroin" and not also the substances listed in the preceding phrase is rejected. As noted in *Todd*, *supra*, Popick's proposed construction of the statute improperly reads an important statutory phrase — "as described in s. 893.03(1)(b) or (2)(a)" — completely "out of the statute." Further, as indicated in *Collins*, *supra*, because hydromorphone originates in opium, Popick was not improperly charged with trafficking in that substance under § 893.135(1)(c).

Any claims or arguments not specifically addressed herein are rejected as lacking merit.

Appendix C

Accordingly, the Court orders:

1. Popick's petition for writ of habeas corpus is **DENIED.**

2. Popick's Request for Oral Argument (Doc. 10) is **DENIED.**

3. The Clerk shall enter judgment against Popick and close this file.

ORDERED in Tampa, Florida, on July 30th, 2001.

s/ Steven D. Merryday
Steven D. Merryday
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING MOTION FOR A CERTIFICATE OF APPEALABILITY DATED AND FILED DECEMBER 31, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 01-15024-E

EDWARD R. POPICK,

Petitioner-Appellant,

versus

MICHAEL MOORE,
Director of Florida Department of Corrections,
ROBERT A. BUTTERWORTH,
Attorney General of the State of Florida,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida

Before **CARNES and HULL, Circuit Judges.**

BY THE COURT:

Upon reconsideration of this Court's order dated November 20, 2001, appellant's motion for a certificate of appealability is DENIED for failure to make the requisite showing. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000).